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In the Supreme Court of the United States

October Term, 1980

WILLIAM ARCHIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the giving of an instruction to the jury in a criminal action that it could "reject" the defendant's testimony solely on the basis that it felt his interest in the outcome of the prosecution was "sufficient to affect" his credibility constitutes reversible error.

2. Whether the exclusion of Petitioner's evidence under Rule 403 of the Federal Rules of Evidence, prior to the presentation of Petitioner's defense, constitutes reversible error.

a. Whether the Fifth Circuit can uphold the trial court's exclusion of evidence under Rule 403, using the "abuse of discretion" standard of review, on grounds neither considered by the trial court nor contained in Rule 403.

b. Whether the trial court's failure to listen to the proffered testimony is an improper exercise of discretion as required by Rule 403.

c. Whether it was an abuse of discretion, in light of the circumstances presented at this trial (including the trial court's singling out of the Petitioner), to exclude certain relevant evidence which was crucial to the Petitioner's defense and which would have served to bolster his credibility.

3. Whether a noncollected check upon which a bank extends credit can be "security" within the meaning of Title 18, United States Code §1014.

4. Whether a noncollected check upon which a bank extends credit and which is an enforceable obligation can be alleged in an indictment to be a "false statement" under 18 U.S.C. §1014 on the theory that it is "overvalued".

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RECORD CITATION

The Record will be cited as it was numbered for the appeal to the Fifth Circuit Court of Appeals as follows:

Trial transcript (Vol. I) is cited as, R, III, pp. 77-407.

Proffer of testimony transcript (Vol. II, Supplemental Record) is cited as, S.R.I, pp. 1-31.

Defense exhibits (excluded from evidence), are cited as, D. Ex. 1-22 (excluded from evidence).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, William Archie Williams, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 19, 1981.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is cited as *United States v. Williams*, No. 80-3064, 639 F.2d 1311 (5th Cir. 1981), and the opinion appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 19, 1981. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on April 17, 1981, and this Petition for Certiorari was filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULES AND STATUTES INVOLVED

As provided by Supreme Court Rule 21.1.(f), the verbatim quotation of the following Rule and Statutes is set forth in Appendix E hereto.

Rule 403, Federal Rules of Evidence.

Title 18, United States Code, §656.

Title 18, United States Code, §1014.

STATEMENT OF THE CASE

On October 19, 1979, a three-count superseding indictment was returned against William Archie Williams (hereinafter "Williams"), the petitioner in this matter. Count I of the indictment alleged that Williams had, with intent to injure and defraud, misapplied funds of the Pelican State Bank (hereinafter referred to as "PSB"), in the amount of $58,055.44, in violation of 18 U.S.C. §656. Counts II and III of the indictment alleged similarly that Williams had willfully overvalued "a security" in violation of 18 U.S.C. §1014 by depositing a personal check in his account at PSB (Count II), and a personal check in his account at the

Winn State Bank (Count III), then knowing that there were insufficient funds in the accounts at the respective drawee banks to cover the checks.

On December 12, 1979, Williams was convicted on all three counts of the indictment. Williams appealed his conviction to the United States Court of Appeals for the Fifth Circuit (Docket No. 80-3064), and on March 19, 1981, Judge Kunzig, Judge of the United States Court of Claims, sitting by designation, wrote the opinion which is the subject of this appeal affirming the conviction of Williams on all three counts. 639 F.2d 1311. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Williams contended on appeal that the trial court's charge on credibility, which not only singled him out, but which also allowed the jury to totally reject his testimony if they believed that his interest in the case merely "affected" his credibility, was error. The Fifth Circuit failed to address this significant issue in its opinion concluding that all points not addressed by the opinion "have been considered and found to be without merit." *United States v. Williams*, 639 F.2d 1311, 1320 (5th Cir. 1981).

Williams further contended that Counts II and III should be dismissed on the grounds (1) that a noncollected check is not "security" within the meaning of 18 U.S.C. §1014; and (2) that such a check cannot be "false" under 18 U.S.C. §1014 on the theory that it is "overvalued". Relying on *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), the Fifth Circuit rejected these claims. 639 F.2d at 1319-1320.

Williams also contended on appeal that the trial court erred in excluding certain proffered documents and testimony on the grounds that they were crucial to his defense, were relevant to show that he lacked any intent to injure

and defraud the bank, and were relevant to show that he reasonably believed that the checks alleged to have been false statements were covered by sufficient funds. The Fifth Circuit upheld the trial court's exclusion of this evidence under Federal Rule of Evidence 403. The Fifth Circuit in discussing the exclusion of evidence concluded that:

> "It is easily seen that the proffered evidence fail[ed] to shed any light upon the principal factual controversies left open by the evidence which was admitted: whether and to what extent, William Archie Williams lent his personal funds to the Pelican Bank so that it could meet its financing commitment to General Motors." *Id.* at 1317.

The Fifth Circuit also concluded that the proffered evidence "is needlessly cumulative; that is, it merely leads to factual conclusions already amply supported in the record (and which the jury apparently discounted)," *Id.* at 1317. The Fifth Circuit further concluded that "procedural costs more than substantially outweigh probative value." *Id.*

The $58,055.44, alleged to have been misapplied by Williams in Count I, was the total amount of a large number of checks written by him between December 20, 1977 and May 2, 1978, on his account at PSB while his account was in an overdraft status. Crucial to his defense on Count I, Williams sought to show that he lacked any intent to injure and defraud the bank because, at all times that his account was overdrawn, he had a much greater amount of personal funds extended through and on behalf of PSB to Taylor Motor Company (hereinafter "TMC") thereby, in effect, making Williams a creditor of the bank [*See, e.g.*, R, III, pp. 249-250, 252-253, 255-256, 268, 270-271; Supplemental Record ("SR"), I (excluded from evidence)].

The personal funds advanced by Williams ($79,678.00 from December, 1977 to March, 1978) were to cover legal and contractual obligations of PSB, and had been extended through PSB to finance the purchase of certain vehicles by TMC. [R, III, pp. 268-271; SR, I, pp. 15-22, and D. Ex. 10-14, 18-22 (excluded from evidence)]. Evidence which was probative of Williams' infusion of his personal money into PSB was directly relevant to the defense that he had no intent to injure and defraud the bank.

In his defense of Counts II and III, Williams sought to show that he had been entitled to some $60,000 in proceeds from the sale of TMC as a result of his having extended funds into PSB which were used to finance vehicles purchased by said entity. Williams sought to show that had the $60,000 received from said sale been credited to his account by Ollie Stone, PSB's cashier, in accordance with Williams' instructions [R, III, pp. 136, 274-275], the checks, alleged in Counts II and III to have been "overvalued," would have been covered by funds when presented for payment at the drawee banks. [SR, I, pp. 2-29; D. Ex. 10-14, 16-22 (all excluded from evidence)]. [*See also*, R, III, pp. 183, 272, 277, 280, 259].

Thus, the fact that Williams had extended his personal funds to cover legal obligations of PSB would have shown that he had a reasonable expectation to believe that the checks, alleged to have been "overvalued" in Counts II and III, would have been covered when presented for payment because of his entitlement to the $60,000.

The District Court excluded Williams' documentary evidence and certain testimony which would have shown that Williams had extended funds to finance certain vehicles shipped to TMC (a legal obligation of PSB), and that Williams was entitled to retain the $60,000 received by him from the sale of the motor company. [SR, I, pp.

2-31; D. Ex. 8-14; 18-22 (all excluded from evidence)]. The excluded evidence would have provided significant support to Williams' defense that there existed a greater monetary obligation from PSB to Williams than Williams owed the bank as a result of the overdrafts. [*See* R, III, p. 268; and SR, I, pp. 1-31].

The District Court excluded the proffered documents and proposed accompanying testimony *in limine prior* to Williams even beginning his defense case [R, III, pp. 225-248], without hearing the proffered testimony which was to accompany the tender of certain documentary evidence, and *after* the Government was permitted in its case in chief to offer evidence from at least three witnesses (present and past officers of PSB) to the effect that Williams had no deposits or savings at the bank other than his checking account. [R, III, pp. 93, 107, 117]. As a result of the exclusion of this evidence, the petitioner's own testimony took on even greater significance to the defense than it otherwise would have if the proffered testimony and documents had been admitted into evidence.

After the exclusion of evidence and the close of the defense case, the District Court then permitted the Government in rebuttal to call two officers of PSB, including Ollie Stone, cashier at PSB during the period December, 1977 through May, 1978; a federal bank examiner who had participated in the audit of PSB in May, 1978; and Jessie Bridges of TMC, all of whom testified essentially that Williams had not extended personal funds on behalf of the bank, and that there had been no monetary obligation on the part of the bank in favor of Williams. [R, III, pp. 352-353, 364-365, 368, 378-380].

In its charge the trial court singled out the defendant by telling the jury that Williams had a "keen personal

interest" in the outcome of the trial, and then went on to instruct the jury as follows:

> *"If you feel that this interest is sufficient to affect the defendant's credibility then—of course—you are free to reject his testimony.* But, remember you may not reject his testimony merely because William Archie Williams is the defendant in this matter." [R, III, pp. 392-93 (emphasis added)].

Significantly, the Fifth Circuit concluded that the jury "apparently discounted . . . factual conclusions . . . which were already amply supported in the record". 639 F.2d at 1317.

REASONS FOR GRANTING CERTIORARI

I. The District Court's Giving of an Instruction to the Jury That It Could "Reject" the Defendant's Testimony Solely on the Basis That It Felt His Interest in the Outcome of the Action Was "Sufficient to Affect" His "Credibility" Is in Conflict With This Court's Decision in *Reagan v. United States*, 157 U.S. 301 (1895); Presents a Conflict Among the Circuit Courts of Appeals; and Raises a Significant Issue Which Goes to the Heart of a Criminal Defendant's Right to Testify on His Own Behalf.

A. The District Court's Instruction Is in Conflict With This Court's Decision in *Reagan v. United States*, 157 U.S. 301 (1895).

This Court, in *Reagan v. United States*, 157 U.S. 301 (1895), was faced, in a criminal action, with the question whether it was proper for the trial court to suggest in its instructions to the jury that the defendant has a significant personal interest in the outcome or result of the action.

In upholding the charge given by the trial court in *Reagan v. United States,* this Court clearly recognized that the interest of a defendant in the outcome of the action is only a factor for the jury to consider in determining the weight, credence and effect to be given to the defendant's testimony. The charge upheld by the Supreme Court in *Reagan* instructed the jury that it "must *determine how far* [*the defendant's evidence*] *is credible,*" and that the interest of the defendant in the result of the action "should be considered by the jury in *weighing his evidence and in determining how far or to what extent,* if at all, it is worthy of credit." *Id.* at 304 (emphasis added).

The cases cited by this Court in *Reagan* similarly involved instructions which pointed out the interest of the defendant as a factor to be considered by the jury when determining the weight and "amount of credibility" to be given to the defendant's testimony. *Id.* at 306-310. *See also, Hicks v. United States,* 150 U.S. 442 (1893).

This Court, however, has *never* extended a trial judge's right to give a charge such as was given in the case at issue. In its charge to the jury, the trial court in this matter first singled out Williams by telling the jury that Williams had a "keen interest in the outcome of the trial." [R, III, pp. 292-293]. The trial court then went significantly further by charging that the jury was "free to reject [Williams'] testimony" if they felt, *without any limitation or reference to degree,* that his interest in the outcome of the case "is sufficient to affect the defendant's credibility."

This charge, *per se,* is patently unfair and prejudicial to Williams, is unsupported by authority, and constitutes plain error which affects the petitioner's substantial rights.

The trial court's charge does not, by its literal terms, even require that the "interest" in fact affect the defendant's credibility, only that it be "sufficient to affect" his credibility. It is virtually inconceivable that a defendant who has a "keen personal interest in the outcome" of a criminal proceeding will be able to select a jury which does not "feel" that such "keen" interest is "sufficient" to "affect" that defendant's credibility in at least some minimal way. As recognized by this Court in *Reagan v. United States*:

> "The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent effects the question of credibility . . . . but the interest is to be considered as affecting his credibility." *Reagan v. United States*, 157 U.S. 301, 305-06 (1895).

The trial court's decision conflicts with *Reagan* (1) because it is tantamount to an instruction to the jury to disregard the defendant's testimony; and (2) because a suggestion to the jury of the interest of a defendant, if proper, must be done only as "a circumstance to be considered in weighing his testimony and determining the credence that shall be given to his story." *Reagan v. United States, supra* at 306.

We respectfully submit that the conflict between the charge given by the trial court and this Court's opinion in *Reagan* deserves careful review by this Court.

B. The Decision Below Conflicts With the Decisions of Other Circuit Courts of Appeals Which Have Disapproved of Singling Out a Defendant in a Criminal Case When Instructing the Jury As to Credibility.

The Fifth Circuit has allowed an instruction to the jury to the effect that it may consider the defendant's interest in the outcome of the case "in determining the degree of credibility that could be afforded to the defendant's testimony." *See, e.g., Nelson v. United States,* 415 F.2d 483, 487 (5th Cir. 1969), *cert. denied,* 396 U.S. 1060 (1970); *United States v. Wiggins,* 566 F.2d 944 (5th Cir. 1978), *cert. denied,* 436 U.S. 950 (1978).

A number of other circuit courts of appeals have also approved instructions which single out a defendant in weighing the credibility to be given to the defendant's testimony, and are in agreement with the essential holdings in the above-cited Fifth Circuit cases. *See, e.g., United States v. Hernandez,* 588 F.2d 346, 349-350 (2nd Cir. 1978); *United States v. Hill,* 470 F.2d 361 (D.C. Cir. 1972); *United States v. Jones,* 459 F.2d 1225 (D.C. Cir. 1972).

Decisions of other circuits, on the other hand, have directly criticized instructions to the jury on credibility in a criminal case which single out the defendant as being improper. In *Taylor v. United States,* 390 F.2d 278 (8th Cir. 1968), *cert. denied,* 393 U.S. 868 (1968), the appellant asserted error because the Court instructed the jury: "It is for you to remember, you have a perfect right to do so, the very grave interest a defendant has in the case." 390 F.2d at 284. The Court expressed its strong disagreement with this type of charge. Mr. Justice Blackmun, then a Judge on the United States Court of Appeals for the 8th Circuit, stated in *Taylor:*

"We do not hesitate to observe, however, that the continuing and frequent attack on an instruction of this kind indicates that its use leaves defense counsel with a troubled mind. We suspect that this discomfort would be alleviated if the defendant were included by reference in the court's general instructions as to all witnesses. We would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference, such as 'including the defendant', should suffice." 390 F.2d at 285.[1]

This preference was forcefully articulated in the later Eighth Circuit case of *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976), *cert. denied*, 429 U.S. 846 (1976), wherein the Court stated with respect to an instruction singling out the defendant that: "It is difficult to understand, in light of the decision of this Circuit, why it was given. . . . [T]he continued use of this instruction can cause this Court to declare, as a *per se* rule, that the error in giving the instruction can never be considered harmless." *See also, United States v. Brown*, 453 F.2d 101, 107 (8th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); *United States v. Long*, 449 F.2d 288, 298-299 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972).

The Seventh Circuit has also expressed its disagreement with a charge singling out a defendant, and has indicated its agreement with the *Taylor* decision. *United States v. Saletko*, 452 F.2d 193, 197-8 (7th Cir. 1971), *cert, denied*, 405 U.S. 1040 (1972). The Seventh Circuit in *United*

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1. The trial judge in the instant case did not specifically extend the general credibility charge to the petitioner, but rather couched it in terms of each witness. Moreover, the charge singling out Williams did not follow immediately after the general credibility charge, thereby giving more emphasis to the trial Court's singling out of Williams. [R, III, pp. 392-393]. *See also, United States v. Hernandez, supra*, at 349-350.

States v. Reid, 410 F.2d 1223, 1228 (7th Cir. 1969), reversed the conviction in part because of an instruction singling out a defendant which "presented an unbalanced picture to the jury which was, on the special facts of th[e] case, prejudicial error."

The First Circuit has also endorsed the admonition given by Mr. Justice Blackmun in the *Taylor* case. *Carrigan v. United States*, 405 F.2d 1197, 1198 (1st Cir. 1969), *cert. denied*, 396 U.S. 1028 (1970).

While we contend that the charge as given goes beyond any charge which singles out a defendant and which has been upheld by this Court or any circuit court of appeals, the resolution of the clear conflict between the circuits as discussed above, if decided consistent with *United States v. Taylor*, would necessarily impact directly upon the validity of the charge given in the instant case. It is clear that a number of circuits are greatly troubled with the singling out of a criminal defendant, and therefore, these conflicts justify the grant of certiorari to review the judgment below, and to consider the viability of this Court's decision in *Reagan*.

C. The Jury Instruction Singling Out the Defendant Raises a Significant Issue With Respect to a Trial Court's Right to Comment Upon the Defendant's Credibility After He Has Testified in a Criminal Proceeding Since the Charge As Given by the District Court Goes Well Beyond Any Decision by This Court or by Any Circuit Court of Appeals.

The question whether singling out a criminal defendant in an instruction on credibility is proper has been raised many times in the Circuit Courts of Appeals. See cases cited *supra*. However, the instruction in the case at issue greatly extends the limitations previously set by this Court

and by these circuits to a point where approval of such a charge will significantly undermine the right of a defendant to testify on his own behalf.

The instructions singling out a defendant, which have been upheld by the various Circuit Courts of Appeal, have invariably pointed out the defendant's interest only as a factor for the jury to consider in making a decision as to what *degree* of credibility to attribute the defendant's testimony. *See also,* the cases cited by this Court in *Reagan v. United States, supra,* and cases cited therein. 157 U.S. 301, 305-06 (1895). This Court also has recognized the importance of this function by a jury. As stated in *Quercia v. United States,* 289 U.S. 466, 471 (1933):

> "It [is] for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law."

We have been unable to find any decision which goes as far as the case at issue which, in effect, allows a jury to reject a defendant's testimony simply if it concludes that the defendant's interest in the outcome, *to any extent or degree,* could affect his credibility. With the instruction as given, the jury could totally reject the petitioner's testimony if his credibility was affected minutely as to an immaterial fact.

The correctness of the trial court's instruction, even assuming the propriety of singling out a defendant, is open to serious question, and in the instant case was clearly prejudicial. As discussed *infra,* the fact that the District Court excluded significant defense evidence increased the petitioner's reliance upon his own testimony which served

as the major basis upon which he claimed his innocence. Singling him out effectively undermined the defense case. This issue is of sufficient importance so as to warrant review by this Court.

II. The Trial Court's Exclusion of Certain Proffered Evidence and the Fifth Circuit's Opinion Raise Significant Issues Regarding the Application of Rule 403 of the Federal Rules of Evidence in a Criminal Trial, and Conflict With Circuit Courts of Appeals in Other Jurisdictions.

The exclusion of evidence by the trial court under the auspices of Rule 403 of Federal Rules of Evidence, and the discussion of Rule 403 by the Fifth Circuit, present serious questions regarding the application of Rule 403 when relied upon to exclude evidence going to the heart of a valid defense in a criminal trial. The exclusion of evidence under Rule 403 in the instant case, which we submit was erroneous, demonstrates the pressing need for guidance from this Court as to the proper application of Rule 403.

The petitioner's defense at trial was based entirely upon a showing that at all times when the petitioner's account was overdrawn (Count I), he had advanced his personal funds into PSB, to cover its legal obligations, in an amount much greater than the amount overdrawn. The jury could rely on this testimony to find that Williams lacked any intention to injure or defraud the bank, and that there was not a reasonable probability of loss. *See, e.g., United States v. Riley,* 550 F.2d 233 (5th Cir. 1977); *United States v. Foshee,* 569 F.2d 401 (5th Cir. 1978); *United States v. Sorenson,* 330 F.Supp. 642, 644 (D.Mont. 1971). *See also, Potter v. United States,* 155 U.S. 438 (1894). This evidence also was vitally important to the petitioner's defense on Counts II and III, because it would

have shown that he was due proceeds from the sale of TMC, and that the $60,000 money order which was received by Williams from the sale of TMC was in fact Williams' money and should have been applied to cover checks alleged as false statements in Counts II and III. This evidence bore directly on the question whether the petitioner reasonably expected to be able to cover the checks which formed the basis of Counts II and III. *See United States v. Bessessen*, 445 F.2d 463, 467 (7th Cir. 1971).

A. The Fifth Circuit's Conclusion That the Proffered Testimony and Excluded Exhibits Were "Needlessly Cumulative" Constituted an Improper Application of Rule 403 and an Abuse of Discretion.

1. The Fifth Circuit's independent application of Rule 403 on appeal directly conflicts with the discretionary power accorded the district courts, and conflicts with an opinion of the Second Circuit Court of Appeals.

The Fifth Circuit concluded that the evidence put forth by the petitioner's proffer at trial merely led to factual conclusions "already amply supported in the record, thereby being needlessly cumulative." 639 F.2d at 1317. The trial court, however, never stated nor suggested that the exhibits offered were cumulative. [R, III, pp. 325-350]. In fact, the trial court *could not* have known whether the proffered evidence was cumulative because the exhibits and proposed testimony were excluded before the defense case began, and further because the trial judge was not in the courtroom when the proffer of testimony was allowed to be made. [R, III, pp. 325-350; SR, I, p. 3]. Although it is not clear why the evidence was excluded

under Rule 403, the only discussion in the record by the trial court relates to the possibility of confusion of the jury. [R, III, pp. 325-350].

The Circuit Court, in effect, substituted its own discretion in an effort to uphold the trial court's decision without the benefit of a trial judge's "observation of witnesses, [or] his superior opportunity to get 'the feel of the case' . . . ." *Noonan v. Cunard Steamship Co., Ltd.*, 375 F.2d 69, 71 (2nd Cir. 1967). *See also, United States v. Robinson*, 560 F.2d 507, 514-515 (2nd Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905. If appellate courts are allowed merely to read the transcript, and then assert their own "discretion" under Rule 403, this undermines the very rationale upon which the appellate courts rely when stating their reluctance to disturb a trial judge's evidentiary rulings. *See, e.g., Miller v. Poretsky*, 595 F.2d 780, 783 (D.C. Cir. 1978); *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976). Rule 403 contemplates a "balancing" by the trial court, not an after-the-fact analysis which did not enter into the decision at the trial level.

The instant case conflicts with the circuit decision in *Dwyer* where the court refused to speculate as to the trial court's basis for a Rule 403 exclusion. 539 F.2d at 928. *See also, United States v. Figuera*, 618 F.2d 934, 942-944 (2nd Cir. 1980). The Court in *Dwyer* stated:

> "Although Rule 403 has placed great discretion in the trial judge, discretion does not mean immunity from accountability. Rosenberg, *Judicial Discretion*, 38 The Ohio Bar 819, 826 (1965). Unfortunately, where the reasons for a discretionary ruling are not apparent to counsel, they will probably not be apparent to an appellate court. . . . The spirit of Rule 403 would have been better served had the judge 'con-

> front[ed] the problem explicitly, acknowledging and weighing both the prejudice and the probative worth' of the proffered testimony." 539 F.2d at 928.

The Fifth Circuit's upholding of the trial court's discretionary application of Rule 403 on grounds not reflected by the trial record is, we submit, an improper method of reviewing the trial court's decision since a court can hardly determine whether there was an "abuse" of discretion if it is unable to discern from the record why the evidence was excluded. *See United States v. Dwyer, supra* at 928.

2. The Fifth Circuit's independent conclusion that the proffered testimony and exhibits were "needlessly cumulative" conflicts with a D.C. Circuit opinion, and fails to give weight to the requirement that arguably cumulative evidence must be *needless* before it may be excluded under Rule 403.

At trial, the petitioner was unable to rely on, discuss or present testimony regarding documentary evidence which directly corroborated his testimony. As significantly, the petitioner was unable to use the proffered testimony of Ollie Stone, a former PSB officer, who worked at the bank on a day-to-day basis. [SR, I, pp. 8-10, 12 and excluded D. Ex. 8-14, 18-22]. At the same time, the government was allowed, both in its case in chief and in rebuttal through at least seven witnesses, to attempt to show that Williams did not have money or credit at PSB to cover the amounts involved in Counts I, II, & III, and to attempt to show that he had not infused money to PSB. [*See, e.g.*, R, III, pp. 93, 107, 117, 352-384; SR, I, pp. 1-31 (excluded from evidence)]. The petitioner was prevented from utilizing non-party witnesses to bolster his

credibility by testifying with respect to the excluded documents. [SR, I, pp. 8-10, 12 and D. Ex. 8-14, 18-22 (excluded from evidence)].

The Fifth Circuit opinion in this case conflicts with the decision of *Miller v. Poretsky*, 595 F.2d 780 (D.C. Cir. 1978). In *Miller*, the court recognized the need of a party not only to meet evidence presented by the adverse party, but also to meet it by resort to a non-party witness.

In *Miller*, a case where the plaintiff alleged that he was a "victim of racial discrimination during the course of his tenancy, and subsequent eviction, from" certain apartments, the defendant was permitted to introduce evidence from black witnesses to the effect that "they had not suffered racial discrimination" at these apartments. The trial court, under Federal Rule of Evidence 403, excluded testimony proffered by the plaintiff of witnesses who allegedly had been discriminated against at these apartments. The Second Circuit, concluding that the exclusion of such evidence was an abuse of discretion, recognized the unfairness of this procedure, and also underscored the right of the plaintiff to rebut the other testimony by other than his own testimony. *Id.* at 783, 785. The Court stated:

> "Such testimony was the counterpart of that which the appellant wished to introduce through Horan, and elementary fairness would require that if the appellee could bring in such evidence, the appellant should have been allowed to do so also. The trial court in making its ruling on this matter alluded to the fact that appellees had only put on witnesses serving to rebut Mr. Miller's own statement in open court, but this rationale proves little. Clearly the testimony of third persons would be more persuasive in the jury's eyes than that of the appellant himself, and he should have been entitled—if he were able—to rebut the landlord's

defense of a non-discrimination motive by the same apparently disinterested evidence that appellees were allowed to use to rebut appellant's claim of racial animus."

* * *

"On the whole, the admission of appellees' witnesses testifying to their freedom from discrimination and the exclusion of appellant's witness testifying to the contrary was, particularly in light of the colloquy at the pretrial conference, that sort of decision which traditionally has been considered an abuse of discretion, *e.g., Burns v. United States,* 287 U.S. 216, 223, 53 S.Ct. 154, 77 L.Ed. 266 (1932); *Langnes v. Green,* 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931); *The Styria,* 186 U.S. 1, 9, 22 S.Ct. 731, 46 L.Ed. 1027 (1902); *Poske v. Mergl,* 169 Ohio St. 70, 157 N.E.2d 344 (1959)." 595 F.2d at 783, 785. *See also, Saunders v. Shaw,* 244 U.S. 317 (1917). *Cf., United States v. 320.0 Acres of Land, More or Less, Etc.,* 605 F.2d 762, 825-826 (5th Cir. 1979).

The Fifth Circuit opinion intimates that the fact that the defendant did not have any notes for the loan he had made to the bank may suggest that those loans were not actually made. 639 F.2d at 1316. This is precisely why the proffered testimony of the accountant and Ollie Stone, as well as the tendered documents, were of significant importance to Williams' defense.

Although the accountant may not have been able to identify the source of the funds, he was able to state unequivocally that the monies came from a third party, rather than from the bank or from TMC itself. His examination of the excluded exhibits also demonstrated that the monies which came from that third party identically

matched the money loaned to TMC. [SR, I, pp. 15-31 (excluded from evidence)]. [*See also*, D. Ex. 8(a), 10-14, 18-22 (excluded from evidence)].

The proffered testimony of Ollie Stone, the bank cashier, which related to some of the excluded exhibits, went well beyond the conclusion that some third party infused money to PSB which later was lent to TMC, and did, in fact, provide *direct* evidence of Williams' infusion of money to PSB. [The relevant quotes from Ollie Stone's proffered testimony are set out in Appendix D, hereto]. This testimony hardly replicates the petitioner's testimony.

The very weaknesses in Williams' testimony, which were pointed out by the Fifth Circuit, and the fact that the government was permitted to present evidence from seven witnesses to discredit his testimony, demonstrates that evidence supporting the petitioner's contention that he infused money to the bank could not be "needlessly cumulative". Moreover, the Fifth Circuit did not recognize a defendant's need in a criminal proceeding to have testimony from third party witnesses, a need even more pronounced because of the charge given to the jury as discussed, *supra*.

The petitioner should have an absolute right to prove, to the extent possible, that the facts which he is asserting are logically and directly supported by other testimony and evidence, even if they bear only "remotely" on the "probability" that Williams acted in good faith. *See United States v. Brandt*, 196 F.2d 653, 657 (2nd Cir. 1952). A defendant "is entitled to have the jury consider any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous." *United States v. Bessesen*, 445 F.2d 463, 467 (7th Cir. 1971).

The unfairness of this trial demonstrates the incorrect application of Rule 403, and the violation of the petitioner's right to due process of law under the Fifth Amendment to the United States Constitution.

3. The Fifth Circuit opinion misreads and misapplies Rule 403 by invoking a balance between "procedural costs" and "probative value."

The Fifth Circuit went on to conclude, "in short", that "procedural costs more than substantially outweigh the probative value." *United States v. Williams, supra* at 1317. Rule 403 in the Federal Rules of Evidence makes no reference to "procedural costs," and consideration of "procedural costs" does not justify the trial court's exclusion of evidence.

The proffered testimony takes up only 29 pages of actual transcript, hardly a burden to impose upon the court system when so much is at stake. *See United States v. Ives,* 609 F.2d 930, 933 (9th Cir. 1979), *cert. denied,* 445 U.S. 919 (1980).

The misreading of Rule 403 by the Fifth Circuit also underscores the need for this Court to examine the scope and application of this Rule of evidence, a rule which has the potential of being subject to tremendous abuse by trial courts if left without strict standards articulated by this Court.

B. The Trial Court Improperly Applied Rule 403 to Exclude Crucial Defense Evidence.

1. The trial court's failure to listen to the proffered evidence is an improper application of Rule 403.

It is significant that the trial court excluded the proffered testimony without even hearing it. [SR, I, p. 3].

The court examined the proffered exhibits in advance of the presentation of the defense in response to the government's motion *in limine*. At that time, without allowing defense counsel to proffer the testimony which was to accompany the introduction of said exhibits, the trial court excluded the evidence. [R, III, pp. 325-350].

In a criminal trial the exclusion of evidence crucial to the defense should not be allowed under Rule 403 and under the rubric of "discretion" if the trial court does not even hear the evidence. The exercise of discretion by the trial court "means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *Lagnes v. Green*, 282 U.S. 531, 541 (1931). The trial judge is not entitled to deference by the circuit courts because of being in a "superior position" to see the witnesses, their mannerisms and reactions, if he is not in the courtroom when they testify. In absence of an examination and observation of witnesses, this Court should set a standard of reviewing the trial court's "exercise of discretion" which is far more stringent than the "abuse of discretion" standard, which we submit is not justified under these facts.

2. The exclusion of this testimony was an abuse of discretion in light of its clear application to the defense asserted by the Petitioner.

It is the discretion, under Rule 403, to *exclude* evidence which goes to the heart of a valid defense in a criminal trial which we respectfully submit warrants consideration by this Court. Under Rule 403, the trial court suggested that the evidence may be confusing. [R, III, pp. 333,

339]. The excluded testimony of Ollie Stone (quoted in Appendix D) we submit not only is clear, but more importantly, goes directly to the heart of his defense, which if believed by the jury, would require an acquittal. Strict standards must be articulated by this Court in order to ensure an "informed" exercise of discretion by the trial court.

Federal Rule of Evidence 403, while serving a useful purpose in certain instances, must not be used as a device which usurps the function of the jury. The importance of the excluded evidence to the defense, coupled with the trial court's allowance of contrary evidence from a number of government witnesses, demonstrates the abuse of discretion. *See Miller v. Poretsky, supra. See also, Saunders v. Shaw, supra.*

III. The Decision Below Raises Significant Questions Regarding the Statutory Construction of Title 18, United States Code, §1014 Because (1) It Upheld the District Court's Conclusion That a Noncollected Check Upon Which a Bank Extends Credit Is "Security" Within the Meaning of 18 U.S.C. §1014; and (2) Upheld Counts II & III Which Alleged That Such a Check Is False Because It Is "Overvalued."

A Fifth Circuit panel in *United States v. Payne,* 602 F.2d 1215 (5th Cir. 1979), *cert. denied,* 445 U.S. 903 (1980). found that a check is "a security", and that giving an insufficient funds check to a bank, under certain circumstances, could constitute the "overvaluation of a security" in violation of 18 U.S.C. §1014. *Contra, United States v. Edwards,* 455 F.Supp. 1354, 1355, and 1357 (M.D. Pa. 1978). We respectfully submit that the decision in *Payne* was erroneous, and that this Court should consider the validity of *Payne* because the Fifth Circuit's ruling is contrary to both the language and history of the statute.

As written, 18 U.S.C. §1014 does not purport to prohibit the overvaluing of "a security." It prohibits, rather, the overvaluation of "security", security in the sense of collateral. The language of §1014 itself indicates that it is speaking of security in the sense of collateral because it specifically proscribes a false statement intended to influence the "substitution of security" on an extension of credit.

18 U.S.C. §1014 is derived from parts of thirteen prior code provisions. Each of its predecessors prohibited the making of a false statement to particular federal agencies, the vast majority of which were primarily concerned with making loans to farmers and homeowners. *See* U.S.C., 1940 Ed., 7 U.S.C. §§1026(a) and 1514(a); 12 U.S.C. §§596, 981, 1123, 1138(d)(a), 1248, 1312, 1313, 1441(a), and 1467 (a); and 15 U.S.C. §616(a). *See also, United States v. Edwards*, 455 F.Supp. 1354, 1355, and 1357 (M.D. Pa. 1978). These transactions involve collateral (usually real estate) given as security for extensions of credit. If a transaction ever involved "securities," it would only involve securities given as collateral. For example, 12 U.S.C. Section 1123 (1940 Ed.) and 12 U.S.C. §1313 (1940 Ed.) state, in identical language:

> "Whoever willfully overvalues any property offered as security for any such advance shall be punished by. . . ."

When a bank extends credit on an uncollected check, the check is not collateral on an obligation, it is the obligation itself. Such an advance of funds is an unsecured extension of credit. The Uniform Commercial Code specifically provides that a check does not operate as an assignment of any funds. Louisiana Revised Statutes 10:3-409(1) (hereinafter "L.R.S."). Where a bank extends funds on an uncollected check, and the check is then

dishonored, the bank merely has the right to have the check honored by the drawer. L.R.S. 10:3-413(2). The check becomes an enforceable obligation; it is not security on an obligation. *United States v. Christo,* 614 F.2d 486, 493 (5th Cir. 1980).

It should be emphasized that a bank is not obligated to give immediate credit on a check; its doing so is a credit decision. L.R.S. 10:4-213(4). Where it chooses to extend such credit and the check is subsequently dishonored, the result is an unsecured extension of credit, evidenced by the check. The government's evidence in the instant case so demonstrates. [*See* R, III, pp. 171-72]. Under such circumstances, the amount shown payable on a check is no different from the amount shown payable on an unsecured demand note.

Since the check upon which such funds are advanced constitutes the obligation itself, and not security on an obligation, it cannot be said that such a check is "security" within the meaning of 18 U.S.C. §1014.

Even if one were to conclude that such a check was "security" within the meaning of the statute, the "value" of such a check, like the value of an unsecured demand note, would be dependent upon the enforceability of the obligation. If the obligation is in fact enforceable, as it was in the instant case, then the obligation is not "overvalued." We respectfully submit that the Fifth Circuit's decision in *United States v. Payne,* which found that a check is "a security" under Title 18, Chapter 113, which deals with stolen property and which specifically defines "a security" to include checks and notes for purposes of that chapter, does not justify the conclusion that a check constitutes "a security" as used in Title 18, Chapter 47 on fraud and false statements (which includes 18 U.S.C.

§1014). *United States v. Payne, supra,* at 1218. *See also,* 18 U.S.C. §2311. Said chapter contains no similar definitional provision.

In absence of a definitional provision the language of a criminal statute should not be broadly construed; it should be strictly construed with "any ambiguity . . . resolved in favor of lenity." *United States v. Enmons,* 410 U.S. 396, 411 (1973); *Rewis v. United States,* 401 U.S. 808, 812 (1971).

The government contended that the checks described in Counts II and III were overvalued and, thereby, became false statements under 18 U.S.C. §1014. If there are insufficient funds at the drawee bank, at the time the check is presented, it is not "overvalued" since the check is still an enforceable obligation of the drawer. Under the Uniform Commercial Code, the drawer represents only that if the check is dishonored, he will pay the check after any necessary notice of dishonor and protest. *See United States v. Edwards, supra* at 1356-57, which conflicts with the Fifth Circuit opinion in *Payne.* In *Edwards,* the district court ruled that the face amount of a check cannot constitute a false statement.

The petitioner in this case fully complied with his contractual obligations under the UCC, and honored the check after receiving notice of dishonor. Therefore, no false statement can be inferred. Therefore, we respectfully request that the Court consider the validity of *U.S. v. Payne,* and dismiss Counts II and III of the indictment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nickolas P. Chilivis, do hereby certify that I have this day served the within and foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit by mailing three copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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This 11th day of June, 1981.

NICKOLAS P. CHILIVIS